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Before The
Surface Transportation Board

STB Ex Parte No. 656
Motor Carrier Bureaus—Periodic Review Proceeding

Reply Comments
Of
National Motor Freight Traffic Association, Inc.
And The
National Classification Committee
Section 5a Application No. 61

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TABLE OF CONTENTS

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SECTION I

REPLY STATEMENT OF

WILLIAM W. PUGH

I.
Reply Statement
Of
William W. Pugh

As Executive Director of the National Motor Freight Traffic Association, Inc. (NMFTA) and in my capacity as Secretary to the National Classification Committee, I am submitting these comments in response to the joint Opening Comments of the National Small Shipments Traffic Conference, Inc. (NASSTRAC) and the National Industrial Transportation League (NITL), collectively referred to as NASSTRAC/NITL, and the comments filed by individual lamps and lighting fixtures companies and their National Electrical Manufacturers Association (NEMA).

First and foremost, exception is taken to the gross misstatement by NASSTRAC/NITL that "in the last proceeding, NCC conceded that the number of increases in class ratings far exceeds the number of decreases." (Joint Comments, p. 13) In the former proceeding in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement, the NCC conducted a review of the 75 dockets processed from 1989 through 1999. Of the 1,506 proposals handled, 307, or 20.39 percent of the total proposals, involved class increases, 252, or 16.73 percent, involved class increases and decreases, and 225, or 14.94 percent, were class reductions. (April 11, 2000 NCC Comments, Attachment B, Verified Statement of Matthew Welsh, NCC's then Docket Coordinator). The NCC's Statement also pointed out that of the 52 classification proposals protested during that period, the NCC was successful in defending those increases in over 95 percent of the agency and judicial proceedings reviewing those classification changes—a fact not acknowledged by NASSTRAC/NITL for obvious reasons. (April 11, 2000 NCC Comments, Verified Statement of Kelly

Powers, NMFTA's Legal Assistant) Notwithstanding the fair relationship of those proposals with reference to class changes, it was demonstrated, that the class increases established were reasonable, and in accord with the standards long established by the Interstate Commerce Commission (ICC) in justifying those changes.

A very serious misstatement is made by NASSTRAC/NITL regarding the purported relationship between class ratings and class rates. NASSTRAC/NITL would have the Board believe that essentially the same organizations are responsible for the collective processes by which classifications are made and general rate increases are established and that there it is a direct relationship between these two collective processes. (Joint Comments, pp. 5-6) The fallacy of that purported relationship is apparent.

> First, classification or reclassification is performed by the NCC and involves a single commodity or group of commodities. A class rating is assigned to reflect the transportability of the article or articles in the carriers' equipment, based on the recognized transportation characteristics of density, stowability, handling and liability. That class rating is the same as or similar to that of other articles having the same or comparable transportation characteristics.
>
> Second, general rate increases applicable to the collectively made class rates are proposed by regional rate bureaus. These general rate increases are based on industry average costs and revenue needs—matters entirely separate and distinct from classification considerations. Moreover, that general rate action affects the class rates, and is not related to any particular class rating which may have been assigned to a particular article or articles by the NCC.

Thus, there is a clear distinction between collective classification-making and collective ratemaking which NASSTRAC/NITL erroneously seeks to blur.

While the class rating can increase on an article, as NASSTRAC/NITL asserts (Joint Comments, p. 6), the rating can also decrease or there can be a change that includes both increases and decreases.. However, it is not true that the shippers incur an increase in their rates comparable to the classification change, and NASSTRAC/NITL has presented no evidence supporting that contention. The purpose of freight classification is not to generate revenue, but rather, as Congress long ago recognized, it is to provide a "useful tool for shippers, receivers and transporters of freight [so] all know what they are talking about, thereby contributing to an efficient and economical transportation system." (HR No. 96 – 1069 96th Congress, 2d Sess., p. 28)

As NASTRAC/NITL acknowledges, the Board required the NCC to implement two major changes in its procedures. The first involved making available to shippers all the information and analyses compiled by staff at an earlier stage of the classification process. The second provided a procedure for a review by a neutral arbitrator of initial NCC classification decisions. As noted in my opening statement the Board explained the necessity for those revisions as follows:

> The changes required as a condition of our approval should improve the classification process by eliminating the perception of bias. This, in turn, should encourage shippers to participate in the entire process from the initiation of research through completion of the process. Central to the improvements are the public availability of the information on which classification decisions are made, including raw data supporting studies and reports. (November 2001 Decision, p. 23)

Notwithstanding NASSTRAC's and NITL's insistence that arbitration was absolutely necessary to eliminate a purported "perception of bias" in the classification process, these same parties acknowledge that the arbitration option has not yet been tried." (Joint Comments, p. 13) Ironically, having "championed" the imposition of the arbitration

process on the NCC's procedures they complain, without ever having tried arbitration, of "injured shippers shouldering the burdens of engaging lawyers and consultants, gathering facts, and going before an arbitrator, the Board, and/or a court for relief." (Emphasis added) (Joint Comments, p. 9) It appears that NASSTRAC/NITL would only be satisfied if freight classification is eliminated, or they can veto any classification decision by controlling the vote.

NASSTRAC/NITL incorrectly attempts to make it appear that the NCC only "favors increases in class ratings," and responds to "a single letter or fax from a member of NMFTA...to trigger an investigation by the NCC staff." (Joint Comments, p. 14) In fact, the NCC handles any and all proposals or inquiries regarding commodities, irrespective of whether the proposal or inquiry comes from a carrier or a shipper. Under Rule 2 of Article IV of the NCC's section 5a Agreement, a Classification proposal can be filed by "any other person, firm, corporation or group having an interest in the content of the Classification..." Further, as provided in Article III, Section 1 of the NCC's Agreement, subsection d, the staff is available to assist shippers in making appropriate proposals for classification changes. Under subsection c of Section 1, the staff is available, on a direct-cost reimbursement basis, to assist shippers in conducting research on classification matters and to report the results to the NCC should the research reveal that a classification change may be warranted. The NMFTA staff is as accessible to shippers as they are the carrier members on classification matters, and other than unfounded contentions criticizing the recently approved classification procedures, NASSTRAC/NITL presents no documentation supporting that serious and misguided allegation.

Joel Ringer will respond to NASSTRAC/NITL's allegations regarding specific commodity reviews, and the National Electrical Manufacturers Association's (NEMA) contentions pertaining to the reclassification of lamps and lighting fixtures. However, response must be made to NASSTRAC/NITL's unsupported comments regarding requests for information, suggesting that if shippers "don't 'cooperate,' they may face an across-the-board class rating increase, based on the NCC Staff's own research," and that the initiation of classification proceedings rests "basically, [on] an anonymous 'tip'." (Joint Comments, p. 14) As Mr. Ringer details, the surveys sent to shippers request information regarding their products which certainly is available to them and, in most cases, they already have regarding the physical characteristics of their articles, i.e. dimensions, shipping weight, density and packaging. It must also be pointed out that in the past NASSTRAC's counsel has advised their shipper members not to submit data on their products to the NCC. Complaining now, without any demonstration as to the validity of that claim, that shippers don't cooperate because of the scope of the information requested, misses the mark. To infer that shippers that do not provide information are penalized by having an across-the-board increase imposed on them goes too far. Not a single instance is evidenced substantiating that very serious allegation. Further, many vehicles are available to the shipper to challenge any purported reclassification based on a failure to "cooperate," rather than being based on the transportability of the articles. Moreover, over the years the professionalism and accuracy with which NMFTA's staff have developed the transportation characteristics of articles is verified by the fact that over 95 percent of the classifications and

reclassifications approved by the NCC have been found reasonable by the ICC and the Board or the courts when challenged.

NASSTRAC/NITL's characterization of the protection of the identity of carriers as an "anonymous tip" attempts to circumvent the Board's recognition that the concealment of that identity is necessary to protect the carrier from shipper retribution. As the Board, in rejecting the previous efforts of NASSTRAC/NITL to get that information, concluded:

> Confidentiality. In [the] 2001 Decision (at 16), we granted the NCC a clear right to excise the name of the shipper or carrier providing the data in order to avoid concerns about possible retaliation for providing the data. The Shipper Groups have not presented any valid reason to make the party actively seek confidentiality rather than have that confidentiality automatically apply. The identity of the provider should have no effect on the utility of the data. The Shipper Groups' proposal, by contrast, could lead to the type of disclosure addressed in our prior decision if a data provider inadvertently omitted a request for confidentiality. (March 2003 Decision, at p. 4)

Further, the Board rejected the shipper request that the NCC identify the source or sources of file data by reference to the size or number of carrier proponents. It concluded that such information could lead to identification of the carriers and permit retaliation by the shippers. Additionally, the Board found that the shippers had not offered any persuasive arguments that such identification had any impact on the validity or probative value of the data. (March 2003 Decision, p. 4)[1]

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[1] Similarly, in its November 2001 Decision, the Board, rejecting the source identification request of the shippers found that:

> One issue of confidentiality merits special mention. The NCC makes a case that carriers should not be subjected to shipper pressure merely for supplying information about the transportation characteristics of commodities they transport. The NCC asserts that carriers have lost business because of their participation in the classification process. [Citation omitted] To avoid concerns of possible retaliation, the name of the entity that provided the raw data may be excised. A

The contention that shippers providing data have "no anonymity" is wrong. Just as in the case of the carriers, and in accord with the Board's prior decisions on this issue, the identity of shippers supplying data is not revealed. There is also no validity to the contention that shipper, commercially sensitive data is revealed. Review of any of the underlying data, reports, analyses, etc., associated with any classification proposal reveals that argument is untrue. (See Joint Comments, p. 15) Defying any logic is the contention that shippers "have to travel to NCC meetings to defend a status quo that their own carriers apparently find satisfactory." (Joint Comments, p. 15) Indeed there is no reason for a shipper to contest a reclassification that its carriers find to be unreasonable or unnecessary because the carriers that provide its service have the option of simply declining to implement the change on that shipper's traffic. Any member carrier has the absolute right to adopt or reject any change in the NMFC (see Agreement, Article IV Rule 9(a).

The inference that classification-making is tainted because "the NCC Staff is answerable to a carrier organization whose members benefit from increased class ratings" is insulting at best. The NMFTA staff consists of highly-trained classification professionals who, for many years, have been regarded as experts in classification matters. To impugn that professionalism, by such baseless innuendo, is impertinent and deserves no further comment.

Perhaps most demonstrative of NASSTRAC/NITL's lack of understanding of the operation of classification is their attack on the density scale because it is non-linear.

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description such as "shipper/consigner" or "carrier" could be provided instead. In this way there could be public scrutiny regarding the balance of data from shippers and carriers, but without subjecting an individual shipper or carrier to pressure from having supplied information to the preparer of the study. (At p. 16)

(Joint Comments, pp. 15-17) As long recognized, density usually is the single most important transportation characteristics in the motor carrier freight classification. As was concluded in Incandescent Electric Lamps or Bulbs, 47 M.C.C. 601, 603 (1947):

> We believe it is inescapable that, in the light of the limited capacities of motor-carrier equipment, as compared with the capacities of railroad freight cars, density, which has always been regarded as an important factor in determining rail classification ratings, merits more consideration, in determining the reasonableness of motor classification ratings, than it has heretofore been accorded. In some circumstances density has been regarded as the most important characteristic in passing upon the lawfulness of rail ratings.

As was recognized in Investigation Into Motor Carrier Classification, 364 I.C.C. 906, 908 (1981).

> The primary purpose of the freight classification is to provide information to rate setters concerning transportation characteristics of commodities. Classification should be performed according to well known methods and principles in order to provide a coherent transportation system.

Density, therefore, is important to the ratemaker in terms of its impact on the loadings that can be achieved in the carrier's trailers, and the ratio of the revenue produced by that weight to the space occupied in the vehicle. Whereas heavy density freight has lower ratings because it provides more revenue producing weight in a given trailer space, light density freight must carry higher class ratings because of the larger amount of space that is occupied by a given weight of such shipments.

NASSTRAC/NITL's complaint that "as density rises, class ratings fall far more slowly, resulting in slower reductions in the bureau class rates that are the baseline for discounting in the marketplace," evidences a lack of understanding of the density/weight relationships in freight classification. (See Joint Comments, p. 16) Given the weight limit of a standard 45-foot trailer of about 45,000 pounds, heavier density freight has the

potential of meeting the legal weight limit of the trailer before the cubic-carrying capacity of the vehicle is filled. Therefore, the class ratings assigned to heavier density commodities are not as sensitive to proportionally small density variations as are the ratings of light and bulky articles which can exhaust the cubic carrying capacity of that vehicle with weights starting well below 2,000 pounds. Obviously, the sensitivity of the class ratings to density variations must be significantly greater at the lighter end of the density range if reasonable weight/revenue relationships are to be maintained.

NASSTRAC/NITL and several lamps and lighting fixture manufacturers contend that the classification process could only be fair if shippers have an equal vote on classification changes with the NCC carrier members. (See, e.g., Joint Comments p. 18) This certainly is not a new argument and, for very sound reasons, has been rejected in the past. As the ICC concluded in Investigation Into Motor Carrier Classification, 367 I.C.C. 243, 255 (1983):

> Shipper participation in the classification process.—A number of shippers argue that they should be able to participate as equal partners in the carrier classification process. We do not agree. The classification is properly within the managerial prerogative of the carriers, although shippers have the right to be heard under the rate bureau agreement. Shippers may seek redress from the Commission if their interests are not protected in the classification process.

In addition to protests and/or complaints to the Board if shippers disagree with a classification action, they can also seek arbitration by a neutral party before a classification change can be published—a remedy they insisted would relieve their "perception of bias" in the process. With those remedies readily available, and having complete access to the information and data upon which carrier classification actions are based, shippers can hardly complain that they are not treated fairly unless they are given

the right to determine, by vote, the classifications of the freight to be transported by the carriers in their vehicles.

I also believe that there is a legal impediment to shipper participation in collectively establishing the classifications applicable on the freight handled in carrier equipment. Section 13703(a) of 49 U.S.C. specifies that the authority to collectively establish classifications arises through the STB's approval of an agreement between motor carriers. Shippers are not included in that provision. Practical considerations militate against permitting shippers to vote on classification proposals. For example a class rating is a reflection of the service demands that the transportation of a particular commodity imposes on the carrier. In classifying a particular commodity it is necessary to rank the service demands associated with the involved commodity relative to the service demands associated with the transportation of all other commodities. Common sense would dictate that these assessments are best made by the carriers who actually transport the commodities.

Considering the opposition to the classification process evidenced in the NASSTRAC/NITL, NEMA and several lamps and lighting fixtures company comments, can it rationally be contended that they would reasonably and fairly apply the recognized classification principles in assessing the merits of a classification proposal? Could shippers be expected to vote in favor of reasonable classification proposals increasing the class ratings applicable on their products or those of related companies? Would it be fair to their competitors to have shippers vote on the increased or lower reclassifications of the products of those companies? Given the misplaced desire of the opposing shippers to do away with the classification process because they mistakenly equate class ratings and

class rates, can the Board reasonably conclude that rational decisions on classification proposals would be reached by those persons? The answers to those questions should be apparent.

Classification is a function rightfully and long entrusted to the motor carriers. It is a determination of the transportability of freight in the carriers' vehicles, and one which they are best able to evaluate. Shippers all too often have a different objective in the classification process; namely, to prevent an increase in the class ratings applicable on their products. That interest is entirely too subjective to allow such interested persons to determine what is the proper classification of their articles. Congress has not chosen to authorize shippers to collectively establish motor carrier classifications, and the Board should not consider subjecting the motor carrier classification to control by the shippers.

Respectfully submitted,

William W. Pugh
Executive Director
National Motor Freight Traffic Association, Inc.

SECTION II

REPLY STATEMENT OF

JOEL L. RINGER

II.

REPLY STATEMENT OF JOEL L. RINGER

This Reply Statement is submitted by Joel L. Ringer, Manager of Classification Development for the National Motor Freight Traffic Association, Inc., and National Classification Committee, 2200 Mill Road, Alexandria, Virginia 22314. I previously submitted a statement in this proceeding as part of the NMFTA/NCC's Opening Comments, dated March 2, 2005.

Comments have been filed with the Surface Transportation Board by the National Electrical Manufacturers Association (NEMA) as well as a number of manufacturers or shippers of lamps or lighting fixtures (lighting industry shippers) opposing renewal of the NCC's antitrust immunity, as governed by its revised Section 5a Agreement. Similarly, Comments have been filed jointly by the National Small Shipments Traffic Conference, Inc., and National Industrial Transportation League (NASSTRAC/NITL) calling on the STB to eliminate, or "further condition," the NCC's antitrust immunity. These Comments warrant strong response.

The Comments of NEMA and the Lighting Industry Shippers Have Been Fueled By Anger Over the Recent Reclassification of Lamps and Lighting Fixtures

I have worked for NMFTA/NCC for almost 28 years, and I cannot recall a single shipper or shipper group that liked getting a class increase. Certain shippers and shipper groups familiar with the classification system have understood that a class increase might be justified and have (perhaps begrudgingly) accepted that fact.

Some shippers and shipper groups, though, refuse to accept the idea that a class increase is justified for their product(s), even when demonstrated that such an increase is

fully consistent with established classification principles and criteria; indeed even when so determined, upon review, by the Interstate Commerce Commission or now the STB.

Occasionally, a disgruntled shipper or group—unable to prevail on the merits of their case—will lash out against the classification system and allege, without foundation, that the NCC and its procedures must be inherently unfair to shippers and/or are not in the public interest. Witness, for instance, the Halogenated Solvents Industry Alliance, Inc. (HSIA), and the Secondary Materials and Recycled Textiles Association (SMART), who submitted Comments in connection with the previous Section 5a proceeding.[1] This is the tack now taken by NEMA and the lighting industry shippers.

The Reclassification of Lamps and Lighting Fixtures

Classification provisions for lamps, lighting fixtures and parts thereof were amended last year amid vehement opposition from the lighting industry.

Subject 9 of National Classification Committee Docket 2004-2 (May 2004) was a proposal by five member carriers of the NCC to amend the classification of lamps or lighting fixtures. The proposal was docketed in view of extensive data showing that the classification provisions then in effect did not reflect the transportation characteristics of the involved products, and the carriers sought to bring the provisions in line with accepted NCC policies and guidelines. A copy of the proposal is appended hereto as Attachment A.

The NCC Acted In Cooperation with Shipper Interests and In Full Compliance With Its Revised Section 5a Agreement

The carriers' proposal to amend the classification provisions for lamps and lighting fixtures, Subject 9 of Docket 2004-2, was considered by the Classification Panel

[1] Section 5a Application No. 61 (Sub-No. 6) and Section 5a Application No. 61, National Classification Committee – Agreement.

that met on May 4, 2004. In accord with the NCC's revised Section 5a procedures, Docket 2004-2 was issued on March 4, 2004, 61 days prior to the May 4 public meeting. It was posted on NMFTA's website along with the public docket file. A printed copy of the docket bulletin was mailed to all members of the NCC—including of course the carrier proponents of the proposal and members of the Classification Panel scheduled to consider the proposal—as well as to all docket subscribers. It was also mailed directly to 66 shippers and shipper representatives whom the NMFTA/NCC staff had identified as potentially having an interest in the proposal, including the American Lighting Association (ALA) and NEMA.

The docket bulletin—the printed version and as posted on the website—contained the full text of the proposal and, in the accompanying appendix, the complete staff report (analysis). The docket bulletin specified the date, time and location of the public Panel meeting; it specified how to contact the NMFTA/NCC staff member to whom the proposal was assigned; it stated where to find information for contacting the proponents; and it detailed how to obtain the raw data and other information of record in the NCC's public docket file, including almost 65,000 density observations in the NCC's possession.

Letters were timely received from 20 shippers and shipper representatives in opposition to the proposed changes, but none furnished data. Writing on behalf of NEMA and ALA, the shippers' lead representative at the time, Donald S. Varshine of Keystone Dedicated Logistics, recognized "a need for some [classification] adjustments," but disagreed with the proposed approach. He indicated the shippers wished to explore alternatives.

Mr. Varshine and six other shipper representatives appeared at the May 4 Classification Panel meeting. The shippers stated that they had not had sufficient time to gather relevant information on their own and again expressed their desire to develop an alternative proposal. They asked for the opportunity to do so, stating that they would conduct a survey of their members and have the results in time for consideration by the NCC at its scheduled meeting on August 3, 2004. The shipper representatives in attendance said further that they would accept classification provisions consistent with NCC policies and guidelines, as might be supported by the results of their survey.

In the spirit of cooperation with interested shippers, the Classification Panel agreed to their request. The Panel disapproved Subject 9 of Docket 2004-2 and redocketed the proposal for consideration by the full NCC in August.

Following the Classification Panel meeting in May, Mr. Varshine told the NMFTA/NCC staff that the August NCC meeting posed a potential scheduling conflict for him. Although the conflict involved a matter unrelated to NCC or NMFTA business, the NCC rearranged its August meeting agenda—essentially moving its morning session to the afternoon and vice versa—as an accommodation to Mr. Varshine and the other shipper interests.

The redocketed proposal was designated Subject 10 of Docket 2004-3 (August 2004). In accord with the NCC's revised Section 5a procedures, the docket bulletin was issued on June 3, 2004, 61 days prior to the NCC's public meeting on August 3. Again, in accord with the NCC's revised Section 5a procedures, the docket bulletin was posted on NMFTA's website. A printed copy was mailed to all members of the NCC, to all

docket subscribers and to (now) 76 shippers and shipper representatives believed to have an interest in the proposal, including NEMA and ALA.

Docket 2004-3 contained the full text of the proposal, with the complete staff report (analysis) in the accompanying appendix. The docket bulletin specified all pertinent information relating to: the date, time and location of the NCC's public meeting; contacting the assigned NMFTA/NCC staff member as well as the proponents; and obtaining the NCC's public docket file.

The public docket file was posted on the NMFTA's website and made available to all interested persons on June 3, concurrent with the docket bulletin, 61 days in advance of the NCC's public meeting. The public docket file contained all pertinent information in the NCC's possession, including now *more than* 65,000 density observations.

A statement was timely submitted by Mr. Varshine on behalf of NEMA and ALA with the results of the shipper survey, claiming to represent over one million "transactions." *However,* while the NCC had made available to the shippers all of the raw data in its files, including tens of thousands of density observations, the shippers provided no raw data whatsoever. This is significant, as the NCC had no way of confirming the accuracy of the shippers' information. More importantly perhaps, the shippers' lack of disclosure is contrary to what the STB envisioned in its approval of the NCC's revised Section 5a Agreement.

In its decision of November 20, 2001,[2] the STB stated:

> [W]e find that the public interest requires that those who produce studies and analyses and who intend to rely upon them in support of a classification proposal—whether they be carrier interests or shipper

[2] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, decided and served November 20, 2001, at page 16.

interests—must make the raw data underlying the studies and analyses available to interested persons.

Thus, to assure fairness in the classification-making process, the STB viewed the full disclosure of information as being a two-way street. Not only was the NCC required to make available all pertinent information in its possession—which it did—but shippers were expected to do the same—which they did *not.*

Subject 10 of Docket 2004-3 was considered at the NCC's public meeting on August 3, 2004 with 12 shipper representatives in attendance. The shippers discounted the NCC's data by characterizing as non-representative over 65,000 density figures relating to actual shipments that moved via our member carriers. They also ignored the fact that their own study, though unsupported by any raw data, confirmed the NCC's research in that it showed densities for lamps and lighting fixtures to be distributed throughout a very wide range, with generally favorable stowability, handling and liability characteristics.

Moreover, the shippers abandoned their own position that some classification adjustments were in order, and they failed to live up to the commitment they had made at the May 4, 2004 Classification Panel meeting to accept classification provisions consistent with NCC policies and guidelines.

Instead, the shippers insisted that their (unsupported) study justified the continuation of the then-current classification provisions, even though it had been demonstrated that those provisions were not in keeping with NCC policies, including the density guidelines.

Following a lengthy and comprehensive discussion, the NCC voted overwhelmingly to approve the changes proposed in Subject 10 of Docket 2004-3.

The Lighting Industry Did Not Challenge the Reasonableness of the Classification Change

The classification-making process has long incorporated safeguards against the establishment of unreasonable classifications. Under the NCC's previous procedures, dissatisfied parties could appeal actions of a Classification Panel to the full National Classification Committee. And there was oversight by the STB and its predecessor the Interstate Commerce Commission via protest or complaint.

The NCC's revised Section 5a Agreement includes a process whereby any party that disagrees with an initial classification action by a Classification Panel or the NCC can seek review by a neutral arbitrator. Reconsideration by the full NCC (in essence the old appeal process) is available as an alternative to arbitration if all parties objecting to the classification action agree to that procedure. And dissatisfied persons can still take the matter to the STB via protest or complaint.

In view of the lighting industry's opposition to, and obvious displeasure with, the reclassification of lamps and lighting fixtures, the NMFTA/NCC staff made certain that the shipper representatives were advised of the remedies available to them under the NCC's revised Section 5a procedures, including the STB-approved arbitration process.

In a letter dated September 2, 2004, Malcolm O'Hagan, President of NEMA, and Richard D. Upton, President and CEO of ALA, indicated that neither group would be seeking arbitration. No explanation for the associations' decision was given. But copies of the letter, which contained certain inaccuracies and misleading statements regarding the NCC's handling of the matter, were sent to all three members of the STB. We responded in a letter dated September 9, 2004, copies of which were likewise sent to the STB members.

In our September 9 letter, we said that we could not understand why, if the lighting industry truly believed that the reclassification of lamps and lighting fixtures was not in keeping with established classification principles, neither NEMA nor ALA would avail themselves of all remedies at their disposal under the NCC's STB-approved procedures. They decided not to seek arbitration, or as an alternative, reconsideration. Nor, as it happened, did they file a protest or complaint with the STB. We would suggest now that maybe the lighting industry realized that they could not prevail on the merits. Perhaps they realized that the NCC had conducted itself in full accord with its STB-approved procedures, and the action taken by the NCC was fully consistent with recognized classification principles and criteria. Indeed, the provisions approved by the NCC for lamps and lighting fixtures are virtually identical to those that were approved, based on very similar transportation characteristics, for cloth, fabric or piece goods, as named in NMFC item 49265, and which upon protest had been found to be reasonable by the STB.[3]

The Comments of NEMA and the Lighting Industry Shippers in the Instant Proceeding Should Be Seen for What They Are: Retaliation

Unable to prevail on the merits, yet nonetheless dissatisfied with the reclassification of lamps and lighting fixtures, NEMA and the lighting industry shippers have embarked on a vindictive letter-writing campaign in an attempt to convince the STB not to renew the NCC's Section 5a Agreement and antitrust immunity. In their letter of September 2, 2004 NEMA (with ALA) said that "While we have decided not to seek

[3] In STB Docket No. ISM 35007, Protest and Petition for Suspension and Investigation (National Motor Freight Classification), decided January 20, 2000 and served January 21, 2000, the STB stated (at page 2), "we believe that, as a general matter, density-based ratings are desirable, particularly for products...which pose no significant stowability or handling problems and where there are wide variations in shipment density," and it found the provisions approved by the NCC for cloth, fabric or piece goods to be reasonable.

arbitration at this time, we are actively reviewing our other short-term and long-term options." So this attack on the NCC's collective classification-making activities was not unexpected.

We observe that the shipper letters appear to be near-identical, boilerplate rhetoric, and they incorporate wording found, almost verbatim, in NEMA's February 18, 2005 letter to the STB in this proceeding. It is evident that this is an orchestrated effort.

In opposing continued antitrust immunity for the NCC, NEMA and the lighting industry shippers refer to freight costs. Apparently alluding to the reclassification of lamps and lighting fixtures, NEMA says, "Logistics professionals from eight leading NEMA luminaire product manufacturers face increasing freight costs. These are escalating costs and are a detriment to our overall competitive environment."[4] NEMA provides no empirical data to support its assertion.

More importantly, though, the references to freight costs and competitive pressures in the lighting industry are misplaced.

As the STB correctly noted in its November 20, 2001 decision in the previous Section 5a proceeding, classification is the first step in a two-step motor carrier ratemaking system. The second step is to use the classification in conjunction with a rate schedule to arrive at the freight charge for the involved shipment.[5]

The class assigned is based on the transportation characteristics of the particular product or product group, i.e., density, stowability, handling and liability. Market and economic considerations may enter into a carrier's pricing decisions, but they play no

[4] NEMA letter of February 18, 2005.
[5] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at pages 2-3.

role in setting classifications. In fact, the NCC is expressly prohibited from taking such considerations into account. As stated by the STB in its aforementioned decision, "the NCC may consider only transportation characteristics and not market or economic factors when classifying freight."[6] (Emphasis ours.)

The NCC could have avoided rancor with the lighting industry and the barrage of letters to the STB opposing renewal of its antitrust immunity if it had acquiesced to NEMA, ALA and the lighting industry shippers. Not once during the STB's previous review of the NCC's Section 5a procedures—which covered a period of some six years—did the lighting industry submit comments opposing collective classification-making. Only after the reclassification of lamps and lighting fixtures did they weigh in against the NCC.

But the NCC's mandate is to classify all products based on their transportation characteristics. Intimidation and coercion are not transportation characteristics.

The NASSTRAC/NITL Comments Are a Collection of Misrepresentations, Distortions and Innuendo

Picking up where they left off in the previous Section 5a proceeding, NASSTRAC/NITL alleges that, even with the revisions prescribed by the STB, the NCC's Section 5a procedures remain tilted in favor of the carriers and their unquenchable thirst for class increases. They "support" this premise with a stream of misrepresentations, inaccuracies and untruths.

[6] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* footnote 4 at page 3.

NASSTRAC/NITL claims that "In the last proceeding, the NCC conceded that the number of increases in class ratings far exceeds the number of decreases."[7] Untrue. As William W. Pugh, NMFTA Executive Director and NCC Secretary, points out in his Statement herein, during the previous proceeding we detailed the results of a study we conducted of all 75 NCC dockets issued between 1989 and 1999. Of the over 1500 proposals listed on those dockets, 20.39 percent involved class increases only, while 16.73 percent involved both increases and reductions, and 14.94 percent involved class reductions only. (The remaining 47.94 percent involved packaging, clarification and the cancellation of obsolete provisions.)[8]

The NCC's Research Surveys Are Not Unfair to Shippers

NASSTRAC/NITL suggests that:

> NCC procedures appear to favor increases in class ratings. A single letter or fax from a member of NMFTA is apparently enough to trigger an investigation by the NCC staff. The carrier (whose identity will not be revealed) merely has to advise the NCC staff that it handled a shipment of a commodity whose density appears to support an increase in the current class rating.[9]

This distorts the NCC's research efforts.

The NMFTA/NCC staff conducts investigations, or as we call them research projects, when directed to do so by the NCC or one of its Classification Panels. Also, as NASSTRAC/NITL says, a research project can be initiated at the request of a member carrier. What NASSTRAC/NITL fails to say, however, is that a *shipper* can request the NMFTA/NCC staff to conduct classification research, too. The STB required that such a

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[7] NASSTRAC/NITL Comments, at page 13.
[8] See Comments of the National Classification Committee, dated April 11, 2000, Verified Statement of Matthew Welsh, Attachment B.
[9] NASSTRAC/NITL Comments, at page 14.

provision be incorporated into the NCC's revised Section 5a Agreement.[10] In addition, NASSTRAC/NITL fails to mention that requests for research may involve classification issues that have nothing to do with class assignment, such as packaging or to determine if a particular NMFC provision is obsolete.

NCC research surveys really have only one function: to obtain as much accurate and representative information as possible on the particular classification issue from both carrier and shipper sources; and when Federal or state regulations are involved, from governmental sources as well. The information obtained either will or will not justify a change in the NMFC, based on recognized classification principles and criteria. Regardless of who requested the research, or why, there can be no class increase, class reduction or any other amendment to the NMFC if the facts, data and evidence obtained do not support such a change. But if they do support a classification change, the NCC is statutorily obliged to make that change.[11]

According to NASSTRAC/NITL, requests to participate in the NCC's research activities "generally come as a surprise to shippers, since carriers are usually actively soliciting their business at the current class rating."[12] This is misleading.

Carriers are always soliciting new business. Trucking is very competitive, and there is only so much freight out there. A carrier that does not attract and keep new customers does not survive very long. But this does not mean that carriers cannot, or should not, review the classification of a particular product to ensure that it accurately reflects the transportability of that product and make adjustments where warranted. To

[10] Article III, Section 1(c) of the revised Agreement.
[11] See 49 U.S.C. Section 13701(a).
[12] NASSTRAC/NITL Comments, at page 14.

follow NASSTRAC/NITL's reasoning, shippers must likewise be surprised when carriers adjust their rates periodically to reflect economic and financial realities.

The NCC's goal in conducting its research surveys is to obtain accurate, representative data. So when researching a product or product group the NMFTA/NCC staff endeavors to contact as many shippers as possible for information pertaining to their products. The NCC's files are carefully reviewed to identify interested shippers, as are various publications. One excellent source that is routinely consulted is the *Thomas Register of American Manufacturers,* which identifies tens of thousands of companies, categorized by product or product group. Trade and professional associations that might represent interested shippers are also contacted. For this purpose the NCC uses the current directory of *National Trade and Professional Associations of the United States,* published by Columbia Books, Inc, Washington, DC.

In the course of conducting a single research project it is not uncommon for the NMFTA/NCC staff to contact literally hundreds of companies. Moreover, shippers and associations that do not respond to our initial solicitation are contacted a second time so that they have every opportunity to participate.

The NCC's Research Surveys Are Not Unduly Burdensome on Shippers

NASSTRAC/NITL characterizes the NCC's research surveys as "extremely burdensome" on shippers because they take "substantial time to fill out completely."[13] NASSTRAC/NITL claims that "shippers are asked to provide reams of data..."[14] Is this why NASSTRAC has in the past actually advised shippers not to participate in NCC research?

[13] NASSTRAC/NITL Comments, at page 14.
[14] NASSTRAC/NITL Comments, at pages 14-15.

Anyway, the truth is that to facilitate shipper input the NMFTA/NCC staff includes a straightforward, easy-to-fill-out questionnaire and postage-paid return envelope with each research solicitation. The questionnaire is designed to elicit specific information relating to all four transportation characteristics and asks questions that help assure that the data submitted is representative and relates to goods moving via NMFC-participating carriers.

Examples of questionnaires that have recently been sent to shippers are appended hereto as Attachment B. As can be seen, they are relatively short and to the point. By no means do they call on shippers to furnish the NCC "reams of data," and they are designed to be anything but "burdensome." Furthermore, if it is too time-consuming or is otherwise infeasible for a shipper to provide specific information on every model of the involved product it might ship, data on a representative sampling would certainly suffice.

With regard to the alleged "imbalance" between the costs incurred by carriers in the research process and the costs incurred by shippers, NASSTRAC/NITL conveniently omits that it is the carriers that underwrite the NCC's collective classification-making activities through their annual participation fees.

"Revere 10-Inch Frying Pans"

NASSTRAC/NITL's comment regarding "Revere 10-inch frying pans"[15] is ludicrous. NASSTRAC/NITL seems to suggest that if the NCC receives a report indicating a potential classification-related problem involving "a shipment of Revere 10-inch frying pans from a particular distributor to a particular retail outlet," any subsequent research should be restricted to that shipment of that exact product. Such an idea reveals a total lack of understanding of the NMFC and freight classification in general.

[15] NASSTRAC/NITL Comments, at page 14.

The provisions of the NMFC apply on all goods moving in commerce nationally (actually *inter*nationally) via any participating carrier regardless of whom the shipper might be. The NCC's research must, therefore, be equally broad-based.

Is NASSTRAC/NITL so myopic as to envision a unique classification for 10-inch frying pans? What about 8-inch or 12-inch frying pans? Should they likewise have their own unique classifications?

At its most basic, freight classification is the grouping of commodities by their respective transportation characteristics. This was recognized by no less than the United States Supreme Court:[16]

> Classification in carrier rate-making practice is grouping—the associating in a designated list commodities which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justly and conveniently be given similar rates.

And the Interstate Commerce Commission understood 100 years ago that freight classification cannot be expected to provide separately for every possible variation of a commodity that might exist, when it said:[17]

> No classification can be so minute as to conform to the different varieties and conditions of traffic. To separate different grades or densities of the same articles into different classes...even if it could be accomplished, would go far to defeat the real purpose of classification.

Even classification provisions based on density assign classes to different density groups, not to each and every individual density.[18]

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[16] Director General v. Viscose Co., 254 U.S., 498, 503 (1921).
[17] Planters Compress Co. v. C.C.C. & St. L. Ry. Co., XI I.C.R. 382, 405 (1905).
[18] See Investigation and Suspension Docket No. M-22991, Classification Ratings Based on Density, 337 I.C.C. 784, 798 (1970) wherein the ICC said, "Where carriers have given due consideration to the classification characteristics of a particular commodity, the Commission has approved differences in ratings based upon the density of subgroups of the commodity." (Emphasis ours.)

According to NASSTRAC/NITL, a shipper that does not participate in an NCC research survey "may face an across-the-board class rating increase."[19] Any classification change—whether it be a class increase or reduction, a packaging amendment, the cancellation of an obsolete provision, or some other change—must be supported and justified by the facts, data and evidence in the public record as they relate to established classification-making principles and criteria. If the NCC was to do anything less, its action could never withstand a challenge to a neutral arbitrator, the STB or the courts.

If the information obtained through an NCC research project indicates that there is no basis for a classification change, or is insufficient to support a change, no change is made and the research is discontinued. Since the beginning of 2004, for example, nine research projects have been discontinued with no resultant classification change.[20] The cancellations of these projects are reported in the NCC's disposition bulletins, which are posted on the NMFTA/NCC website and freely available to anyone.

Confidentiality

NASSTRAC/NITL sounds the alarm that "shippers have no anonymity, and they must therefore be concerned about disclosure of commercially sensitive data concerning what they make and how and where they ship it."[21] This is a stunning remark coming from NASSTRAC/NITL, since in the previous Section 5a proceeding it was NASSTRAC

[19] NASSTRAC/NITL Comments, at page 14.
[20] Research Projects: 846, Articles in Display Packages; 884, Panel Tool Guides; 902, Stepladders, industrial, wheel or caster type – Packaging; 905, Projectiles or Ammunition, not regulated by DOT as a hazardous material; 924, Hose Reels; 929, Animal Shoes, including Horseshoes; 930, Horse Blankets or Covers; 937, Filter Press Plates or Cake Frames; and 941, Balusters.
[21] NASSTRAC/NITL Comments, at page 15.

and NITL that attempted to gain access to this information, including the name(s) of anyone who submitted data to the NCC.

In its November 20, 2001 decision,[22] the STB addressed the issue of confidentiality and concluded that:

> [F]or the most part, information about the physical transportation characteristics of commodities commonly transported in trucks will not involve confidentiality concerns. The commodities are readily available on the open market, where their physical transportation characteristics can be directly observed. To perform its functions, the NCC does not require, and need not request, the type of information that most often raises confidentiality problems... Protective orders can be used to deal with the rare docket where confidentiality could be a concern.

The issue of "source identification" was treated separately, and the STB concluded that to avoid possible economic retaliation, the name of the entity providing data to the NCC may be "excised."

To the extent that commercially sensitive information finds its way to the NCC, such as information identifying and relating to specific models of specific companies, that information is kept confidential and is not included in the NCC's public docket file unless expressly permitted by the entity involved.

Shippers Do Not Have to Attend NCC or Classification Panel Meetings

NASSTRAC/NITL's comment that shippers "may...have to travel to NCC meetings to defend a status quo..."[23] is simply not true. Under the NCC's previous Section 5a procedures and now under its revised procedures, interested persons *may* attend the open, public meetings of the NCC and its Classification Panels. Written statements may be submitted in addition to, or in lieu of, an appearance before the NCC

[22] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra*, at pages 15-16.
[23] NASSTRAC/NITL Comments, at page 15.

or Panel. So if an interested person is unable or chooses not to attend an NCC or Panel meeting, they can still provide a written statement. In fact, the NCC's revised Section 5a Agreement says, "Any interested person may file with the Secretary of the [NCC] written representations respecting any docketed proposal or other classification matter in electronic or paper format. Written representations relating to a docketed proposal will be included in the [NCC's] public docket file."[24] And copies are distributed to the NCC or Panel, as the case may be.

The NMFTA/NCC Staff

NASSTRAC/NITL says that the NMFTA/NCC staff "is answerable to a carrier organization [the NCC] whose members benefit from increased class ratings,"[25] the implication being that the staff is therefore tainted and its data collection, compilation and analysis are suspect. This blatant attempt to impugn the honesty, integrity and professionalism of the NMFTA/NCC staff is totally without foundation and is nothing less than insulting. Imagine what NASSTRAC/NITL's reaction would be if the NCC were to assert that data from shipper sources is unreliable because it comes from people who are answerable to an organization or company that would benefit from *reduced* classes.

The staff is hired by NMFTA to do a job, i.e., to assist the NCC in the task of maintaining the NMFC so as to ensure that individual commodity classifications accurately represent the transportability of the products to which they apply. And this the staff does honestly, fairly and to the best of its ability. As I have already said herein, any classification change—a class increase, class reduction or whatever—has to be supported

[24] Article III, Section 3(d) of the revised Agreement.
[25] NASSTRAC/NITL Comments, at page 15.

and justified by the facts, data and evidence in the public record as they relate to established classification-making principles and criteria. Moreover, there are protections built into the system to make certain the NCC and NMFTA/NCC staff do not act improperly. All classification changes are subject to review by a neutral arbitrator, the STB or the courts.

The NCC's Procedures and Standards Are Not "Skewed" Against Shippers

NASSTRAC/NITL alleges that the "NCC's procedures and standards [are] skewed in favor of carriers and against shippers" and admonishes the STB to "favor structural remedies...that will eliminate or minimize potential [carrier] abuses."[26] This ignores the significant changes prescribed by the STB as conditions of its approval of the NCC's Section 5a Agreement to "improve the classification process by eliminating the perception of bias."[27] Among those changes was arbitration. Championed by NASSTRAC and NITL, arbitration was inserted in the classification-making timeline—prior to any administrative or judicial review—to enable shippers and other parties dissatisfied with a classification action by the carriers, i.e., the NCC, to have that action reviewed by an independent "neutral." The STB determined that "the best way to provide the necessary assurance of fairness in the collectively established classification process is to require the NCC to provide interested parties with an option of review by a neutral arbitrator."[28] (Emphasis ours.)

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[26] NASSTRAC/NITL Comments, at page 17.
[27] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 23.
[28] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 19.

However, NASSTRAC/NITL now appears to be uninterested in that option. As stated in our Opening Comments and as NASSTRAC/NITL acknowledges,[29] no one has yet sought arbitration in connection with any classification proposal. But how can NASSTRAC and NITL persist in arguing that the NCC's collective classification-making activities are "skewed" against shippers when neither group—nor NEMA or anyone else for that matter—has had cause to invoke the safeguards already in place to assure fairness in the process, including safeguards that they themselves advocated?

The fact is that since the STB's decision approving the NCC's revised Section 5a Agreement became effective, NASSTRAC and NITL have largely been missing in action. There have been five NCC dockets considered since the decision became effective, containing a total of 85 proposals and 117 review matters. NASSTRAC submitted a letter (jointly with the Health & Personal Care Logistics Conference) in connection with one review matter, and NITL has not been heard from at all. The truth is NASSTRAC and NITL have had virtually no firsthand experience with the NCC's revised Section 5a procedures.

Just as the NCC's Section 5a Agreement was revised to address what was described as a *perception* of bias in the classification-making process, NASSTRAC/NITL now asks the STB to order further revisions—or eliminate the NCC's antitrust immunity entirely—to address *potential* abuses. There has been absolutely no evidence submitted in this proceeding by NASSTRAC/NITL or anyone else indicating any abuse in the classification-making process by the NCC, its staff or its member carriers, because there has been no abuse.

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[29] NASSTRAC/NITL Comments, at page 13.

Class Increases vs. Class Reductions

NASSTRAC/NITL says the NCC is "likely" to argue that some shippers' classes need to be increased "so other shippers don't pay too much."[30] That argument will not be made because it is invalid and unrelated to classification-making.

The NCC does not set freight rates; it assesses the transportability of goods moving by motor carrier and assigns classifications accordingly. And regardless of the particular classification(s) assigned, carriers are always free to negotiate freight rates with their shipper customers, and regularly do. In trucking, as in almost any business, market forces determine pricing. Carriers and shippers may enter into contracts, FAK rates or any other pricing mechanism.

The NMFC is a tool that facilitates motor carrier pricing. The value of the NMFC in this regard to both carriers and shippers has been recognized by the United States Congress, which has characterized freight classification as a:

> useful tool for shippers, receivers and transporters of freight [so] all know what they are talking about, thereby contributing to an efficient and economical transportation system.[31]

The NMFC enhances carrier-shipper pricing negotiations in a competitive environment by providing important, relevant information on the commodities being shipped. But the NMFC only has value so long as the individual commodity classifications therein accurately reflect the transportation characteristics of the product(s) to which they apply.

NASSTRAC/NITL seems to suggest that the only way the NCC could prove that its classification-making activities are fair to both carriers and shippers would be if the

[30] NASSTRAC/NITL Comments, at page 18.
[31] HR No. 96-1069, 96th Cong. 2d. Sess. p. 28.

number of class increases corresponded to the number of class reductions. This is not the measure of fairness or reasonableness. Changes are made in the NMFC based upon an objective evaluation of the transportation characteristics of the product(s) being considered. Any proposal involving the adjustment of classes—up or down—is evaluated the exact same way, using the exact same criteria.

There are a number of factors that can lead to increased classes. In the assignment of classes all four transportation characteristics, i.e., density, stowability, handling and liability, must be evaluated and considered. However, the primacy of density has been well-established in numerous proceedings before the ICC and STB. The space available in motor carrier equipment, even today's modern equipment, is relatively limited. Denser freight means there is more revenue-generating weight in less space. Consequently, heavier-density products are generally assigned lower classes than lighter-density products. Who can dispute that as plastics replace heavier materials, as sheet metal parts get thinner and lighter, as lightweight electronics replace heavier mechanical contrivances and as packaging techniques such as bubble wrap and foam "peanuts" are introduced, the average density of freight tends to go down? And as densities decrease, the applicable classes must be adjusted accordingly.

Of course, not all class increases are due to density considerations. For example, over the years the dangers associated with hazardous materials have become better understood. Coupled with the DOT-mandated requirements and restrictions on these materials, stowability, handling and liability have been negatively impacted. The applicable classes must be adjusted accordingly.

To be certain there are product and/or packaging developments that can improve a product's transportation characteristics, such as design changes that allow for a more compact, denser package, or that reduce the chance of damage, or enhance stowability. In these and other circumstances a reduction in class is warranted. But it would be preposterous to require that before there can be a class increase on any commodity there must be a corresponding class reduction on another.

No Evidence Has Been Submitted to Support Further Changes to the NCC's Section 5a Agreement

One recommendation offered by NASSTRAC/NITL is "the formation of an advisory panel of shipper and carrier representatives...to consider [further] reforms" to the classification-making process, including developing "procedures that address the problems of disparate burdens on carriers (light) and shippers (heavy)."[32] If NASSTRAC/NITL believes the burdens placed on motor carriers in maintaining the NMFC are "light," it is sadly misinformed.

It is the carriers that bear the burden of underwriting the NCC and NMFTA/NCC staff through their annual participation fees. It is the carriers that volunteer to serve on the NCC, taking valuable time away from their businesses and incurring expenses to attend NCC and Classification Panel meetings. (To consider and vote on classification matters, NCC members have to attend the meetings.) And it is the carriers that face economic retaliation from shippers and risk losing business when they take a stand on principle and cast a vote that might be unpopular with their customers. Indeed, NCC members have risked their jobs by casting a vote that angered a customer. These are not "light" burdens.

[32] NASSTRAC/NITL Comments, at page 19.

The NCC's revised Section 5a Agreement is the culmination of an extensive six-year review by the STB of the NCC's collective classification-making activities. Significant and substantial "reforms" were ordered by the STB as a precondition to its approval of the Agreement, further assuring fairness and "transparency." In the STB's own words:[33]

> The changes required...should improve the classification process by eliminating the perception of bias. This, in turn, should encourage shippers to participate in the entire process from the initiation of research through completion of the process.

As demonstrated in our Opening Comments and again herein, the NCC and NMFTA/NCC staff have fully implemented and complied with the revised procedures. For all the editorializing by NASSTRAC/NITL, NEMA and the lighting industry shippers, no evidence has been submitted to the STB indicating that the NCC or NMFTA/NCC staff has acted in a manner inconsistent with the revised procedures or that any changes have been made to the provisions of the NMFC that are not in full accord with STB-recognized classification principles and criteria.

For these reasons, we again respectfully submit that there is no basis for any further changes to the NCC's Section 5a Agreement.

I, Joel L. Ringer, state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement. Executed on April 1, 2005.

Joel L. Ringer
JOEL L. RINGER

[33] Surface Transportation Board Decision, Section 5a Application No. 61 (Sub-No. 6), National Classification Committee – Agreement, and Section 5a Application No. 61, National Classification Committee – Agreement, *supra,* at page 23.

ATTACHMENT A

ATTACHMENT A

PROPOSAL TO AMEND THE CLASSIFICATION OF LAMPS AND LIGHTING FIXTURES

Present Classification Provisions:

Item No.	Description	Class
	LAMPS OR LIGHTING GROUP: subject to item 109000	
109400	**Lamps,** see Notes, items 109401 and 109402, **viz.:**	
	Chain or Swag Lamps, including **Rain Lamps;**	
	Floor Standing Lamps, with or without integral tray, also in Package 817;	
	Lamps, NOI, also in Packages 794, 817, 1424, 1467, 2204 or 5F;	
	Oil Lamps or Torches;	
	Parts, lamp or lantern, NOI;	
	In boxes, subject to Item 170 and having a density in pounds per cubic foot of:	
Sub 1	Less than 2, see Note, item 109403	250
Sub 2	2 but less than 4, see Note, item 109403	200
Sub 3	4 but less than 8, see Note, item 109403	125
Sub 4	8 but less than 12, see Note, item 109403	92.5
Sub 5	12 or greater, see Note, item 109403	70
109401	NOTE—One incandescent or fluorescent lamp (bulb) for each socket may be included in same box with lamp.	
109402	NOTE—The quantity of globes, shades, reflectors or similar devices must not exceed the number required to equip the articles with which shipped.	
109403	NOTE—When lamps and their complement of globes, shades or reflectors are in separate packages, the density for determining the applicable provisions must be the result of the division of the total weight of all packages by the total cubage (cubic displacement) of all such packages.	
109810	**Lighting Fixtures,** see Notes, items 109811, 109812, 109813 and 109814, **viz.:**	
	Hanging or Pendant Lighting Fixtures, other than glass chandeliers;	
	Fluorescent or High Intensity Discharge (HID) Lighting Fixtures, NOI, with equipment of transformer or ballast, see Note, item 109815, also in Packages 220, 233, 790, 919, 1406, 2228, 2312 or 2477; see Note, item 109816;	
	Housings, recessed incandescent lighting fixture;	
	Lighting Fixtures, NOI;	
	Parts, NOI;	
	In boxes or crates, subject to Item 170 and having a density in pounds per cubic foot of:	
Sub 1	Less than 4, see Note, item 109817	200
Sub 2	4 but less than 8, see Note, item 109817	100
Sub 3	8 but less than 12, see Note, item 109817	85
Sub 4	12 or greater, see Note, item 109817	70
109811	NOTE—One lamp (bulb) for each socket may be included in same box with fixture.	

Present Classification Provisions: — Concluded

Item No.	Description	Class
109812	NOTE—The quantity of globes, shades, reflectors or similar devices must not exceed the number required to equip the articles with which shipped.	
109813	NOTE—Applies only on lighting devices designed for permanent wiring to walls, ceilings, floors, posts or other similar mountings.	
109814	NOTE—Does not apply on electric lighting fixtures equipped with posts or poles exceeding ten feet in length. Provisions for such lighting fixtures are found within items 161150 through 161240.	
109815	NOTE—Accompanying equipment of iron or steel or plastic reflectors may be in packages.	
109816	NOTE—When in shipments of 10,000 pounds or more, fixtures packaged with form-fitting expanded polystyrene end caps may be shrink wrapped on pallets with polyethylene shrink film of 5 mil thickness completely shrouding fixtures and pallet. Shipments to be loaded by consignor and unloaded by consignee.	
109817	NOTE—When lighting fixtures and their complement of globes, shades or reflectors are in separate packages, the density for determining the applicable provisions must be the result of the division of the total weight of all packages by the total cubage (cubic displacement) of all such packages.	

Proposed Classification Provisions:

Item No.	Description	Class
	LAMPS OR LIGHTING GROUP: subject to item 109000	
109400	**Lamps,** etc.	⇉Cancel; see item A-NEW
109401	NOTE—⇉Cancel; see item B-NEW.	
109402	NOTE—⇉Cancel; see item C-NEW.	
109403	NOTE—⇉Cancel; see item G-NEW.	
109810	**Lighting Fixtures,** etc.	⇉Cancel; see item A-NEW
109811	NOTE—⇉Cancel; see item B-NEW.	
109812	NOTE—⇉Cancel; see item C-NEW.	
109813	NOTE—⇉Cancel; see item D-NEW.	
109814	NOTE—⇉Cancel; see item E-NEW.	
109815	NOTE—⇉Cancel; see item F-NEW.	
109816	NOTE—⇉Cancel; no further application.	
109817	NOTE—⇉Cancel; see item G-NEW.	

Proposed Classification Provisions: — Concluded

Item No.	Description	Class

CONCURRENTLY, ADD THE FOLLOWING NEW ITEMS:

LAMPS OR LIGHTING GROUP: subject to item 109000

⇉A-NEW **Lamps or Lighting Fixtures,** see Notes, items B-NEW, C-NEW, D-NEW and E-NEW, **viz.:**

Floor Standing Lamps, with or without integral tray, also in Package 817;

Fluorescent or High Intensity Discharge (HID) Lighting Fixtures, NOI, with equipment of transformer or ballast, also in Packages 220, 233, 790, 919, 1406, 2228, 2312 or 2477, see Note, item F-NEW;

Housings, recessed incandescent lighting fixture;

Lamps, NOI, also in Packages 794, 817, 1424, 1467, 2204 or 5F;

Lighting Fixtures, NOI;

Parts, lamp, lantern or lighting fixture, NOI;

In boxes or crates, subject to Items 170 and 171 and having a density in pounds per cubic foot of, see Note, item G-NEW:

Sub 1	Less than 1	400
Sub 2	1 but less than 2	300
Sub 3	2 but less than 4	250
Sub 4	4 but less than 6	150
Sub 5	6 but less than 8	125
Sub 6	8 but less than 10	100
Sub 7	10 but less than 12	92.5
Sub 8	12 but less than 15	85
Sub 9	15 but less than 22.5	70
Sub 10	22.5 but less than 30	65
Sub 11	30 or greater	60

⇉B-NEW NOTE—One lamp (bulb) for each socket may be included in same box with lamp or lighting fixture.

⇉C-NEW NOTE—The quantity of globes, shades, reflectors or similar devices must not exceed the number required to equip the articles with which shipped.

⇉D-NEW NOTE—Lighting fixtures are lighting devices designed for permanent wiring to walls, ceilings, floors, posts or other similar mountings.

⇉E-NEW NOTE—Does not apply on electric lighting fixtures equipped with posts or poles exceeding ten feet in length. Provisions for such lighting fixtures are found in items 161150 through 161240.

⇉F-NEW NOTE—Accompanying equipment of iron or steel or plastic reflectors may be in packages.

⇉G-NEW NOTE—When lamps or lighting fixtures and their complement of globes, shades or reflectors are in separate packages, the density for determining the applicable provisions must be the result of the division of the total weight of all packages by the total cubage (cubic displacement) of all such packages.

ATTACHMENT B

ATTACHMENT B

NATIONAL CLASSIFICATION COMMITTEE COMMODITY QUESTIONNAIRE

RP 999

Commodity: Sheet Steel Containers

Company:

GENERAL SHIPPING INFORMATION

Do you produce or ship empty, new or reconditioned containers made of sheet steel?, e.g. 55-gallon drums. ❑Yes ❑ No
(If yes, please complete this questionnaire.
If no, just sign and return it. Thank you.)

2. Approximately what percent of these products do you ship via motor common carrier? _____%

3a. What percent of these shipments are: LTL? _____%
(LTL + TL = 100%) TL? _____%

3b. What is the average weight of: LTL shipments? _____lbs
TL shipments? _____lbs

4. What is your approximate tonnage of these products shipped via motor common carrier for a given period (week, month, year)? _____tons per _____

5. What percent of the market for these commodities does your company represent? _____%

6. Please name two motor common carriers who serve your company:

_____

_____

7. Please include sale literature, photographs, or any other descriptive material that may illustrate your products.

TRANSPORTATION CHARACTERISTICS

*Please give **exact** figures.*

Type of Container (e.g. drum, can, pail, box)	NMFC Item Number (include sub if applicable)	This Model as a % of all Models Shipped	Description of Shipping Package, if any (pallet, fibre box, wood crate, etc.)	Outside Dimensions of Shipping Package (in inches)			Weight as Packaged for Shipment (in pounds)	Number of Units in each Shipping Package	Invoice Value as Packaged for Shipment	Claims $ per period (week, month, year)
				length	width	height				

(OVER)

TRANSPORTATION CHARACTERISTICS

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				length	width	height				

COMMENTS

Questionnaire completed by:	
Title:	Date:
Telephone Number:	
Website:	

Thank you

NATIONAL CLASSIFICATION COMMITTEE COMMODITY QUESTIONNAIRE

COMMODITY: Conveyors

COMPANY:

GENERAL SHIPPING INFORMATION

1. Do you produce or ship the commodities named above? ☐ Yes ☐ No
   (If yes, please complete this questionnaire. If no, just sign and return it. Thank you.)
2. Approximately what percent of these products do you ship via motor common carrier? _____%
3a. What percent of these shipments are **LTL**? _____%
3b. What is the average weight of **LTL** shipments? _____Lbs.
4. What is your approximate tonnage of these commodities shipped via motor carrier for a given period (week, month, year)? _____tons per _____
5. What percent of the market **for these commodities** does your company represent? _____%
6. Please name two motor common carriers who serve your company:
   _____
   _____
7. What is the average dollar amount of claims filed for loss or damage to these commodities each year? $_____
8. Use the available space on the back of this questionnaire or attach an additional sheet for comments concerning theft, damage or other shipping problems.
9. **Please include advertising literature or any other descriptive material that may illustrate your products.**

TRANSPORTATION CHARACTERISTICS

Please give exact figures.

Description/ Model Number	This Model as a % of all Models Shipped	Material Construction (aluminum, plastic, steel, wood, etc	Portable or Stationary	Package Description (box, crate, pallet, loose, etc.)	Outside Dimensions of Shipping Package (in Inches)			Shipping Weight of Package (in pounds)	Invoice Value as Packaged for Shipment
					Length	Width	Height		

(over)

TRANSPORTATION CHARACTERISTICS

Please give exact figures.

Description/ Model Number	This Model as a % of all Models Shipped	Material Construction (aluminum, plastic, steel, wood, etc	Portable or Stationary	Package Description (box, crate, pallet, loose, etc.)	Outside Dimensions of Shipping Package (in inches)			Shipping Weight of Package (in pounds)	Invoice Value as Packaged for Shipment
					Length	Width	Height		

COMMENTS

Please provide the names and addresses of your
Two closest competitors:

Name (please print): _____

Title: _____ Date_____

Company Web Site: _____

Telephone Number: _____

SECTION III

ARGUMENT OF COUNSEL

III.
Argument

A. The Statute Only Authorizes The Collective Establishment Of Freight Classifications By Motor Carriers

NASSTRAC/NITL jointly contends that shipper voting participation on NCC proceedings should be permitted, "possibly including a 50-50 mix of carrier and shipper decisionmakers." (Joint Comments, p. 18) That same proposal is also urged by a number of the commenting lamp and lighting fixture manufacturers. Aside from the practical considerations identified in the Reply Statement of William W. Pugh why such a decisional process would be detrimental to reasonable classification-making, the law is clear that the collective establishment of classifications is committed to motor carriers.

Section 13703(a) of 49 U.S.C. unequivocally grants the authority to enter into agreements to collectively establish classifications to motor carriers. Specifically, that provision is limited to motor carriers subject to the Board's jurisdiction. Shippers are not persons identified as permitted participants in the agreement, nor are they subject to the Board's authority in classification matters.

Pursuant to Section 13703(a)(2) of 49 U.S.C., only motor carriers are designated as parties who may submit such agreements to the Board for approval. Under the NCC's approved agreement, the NCC is the body charged with the power and duty to establish the provisions of the National Motor Freight Classification. (See NMFC Agreement, Article III, Section 1) Membership on the NCC consists of officers, owners or full-time employees of motor carriers party to the agreement. (See NMFC Agreement, Article II, Section 3) Shippers do not qualify for NCC membership, and do not qualify as motor carriers party to the agreement.

Even assuming that a legal impediment did not exist as to their participation as voting members of the NCC, shippers are not subject to the Board's jurisdiction as are the motor carrier members of the NCC. What control could the Board exert over the actions of those shippers when their votes prevent the establishment of reasonable classifications or reclassifications?

It cannot be denied that the lamps and lighting fixture manufacturers, if they had a vote, would have decided against the reclassification proposal which assigned full-scale density provisions to their products. In none of their communications with the Board have they demonstrated or argued that the approved reclassification was not warranted by the transportation characteristics of their articles. Those shippers declined to pursue arbitration, did not protest the reclassification to the Board, and have not filed a complaint challenging the reasonableness of that classification change. Rather, instead of pursuing remedies designed to test the reasonableness of the reclassification of lamps and lighting fixtures, which they do not contest, they seek the termination of the NCC's Section 5a Agreement because they were not successful in retaining the former classification provisions which were not in keeping with approved density guidelines.

As little confidence can be had in the objectivity of NASSTRAC/NITL in view of their comments, and institutional opposition to the motor carrier classification. It cannot seriously be suggested by either organization that they would vote in favor of a classification or reclassification of their shippers' products which resulted in increased class ratings. Their joint comments plainly state their opposition to such class rate changes, arguing that such matters solely should be the product of negotiations between shippers and their carriers. Having criticized, albeit erroneously, the classification

procedures and standards as being unfairly "skewed in favor of carriers and against shippers" (Joint Comments, p. 17), how can they rationally suggest that giving their shippers a 50 percent vote in classification matters would be reasonable or rational or result in warranted classification changes?

Significantly, in the comments of the Transportation Consumer Protection Council, Inc. (TCPC), also a shipper association, submitted in April, 2000 in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement, a very candid affirmation of the inappropriateness of providing shippers voting rights or any form of veto power over the classification process, was provided. TCPC stated that:

> [T]he Council does not believe that there is any practical or workable means by which shippers can participate. The concept of shippers participating in a carrier ratemaking function is just as illogical as having carriers participate in shippers' manufacturers' pricing decisions. (TCPC Comment, p. 2)

Equally impractical and unwarranted is the "possible alternative" NASSTRAC/NITL proposes to shipper voting, involving "the formation of an advisory panel of shipper and carrier representatives, under STB auspices and with antitrust immunity, to consider reforms beyond the access to data and arbitration reforms previously ordered by the Board." (Joint Comments, p. 19) No need for additional changes to the NCC's procedures has been identified. Moreover, Section 13703 of 49 U.S.C. provides antitrust immunity to motor carriers acting under agreements approved by the Board. (See Section 13703(a)(6)) Under what authority would, or could, the Board extend antitrust immunity to such an "advisory panel," or to shippers participating in those activities directly influencing the collective activities and procedures conducted by motor carriers under an approved Section 5a Agreement?

What are the "disparate burdens" that NASSTRAC/NITL references? Characterizing those purported problems as being "on carriers (light) and shippers (heavy)," says nothing. (See Joint Comments, p. 19) After an exhaustive proceeding, a substantial number of changes were incorporated into the NCC's Agreement which substantially increased the carriers' burdens regarding assistance to shippers in conducting research and formulating proposals, notice to potentially interested persons, restrictions on supplementing data for classification proposals, the providing of data and information to shippers at earlier stages of the classification process, and the incorporation of arbitration for shippers in classification matters. Other than the self-serving statements regarding difficulties shippers purportedly have in participating in the classification process, NASSTRAC/NITL offers no concrete showing of a disparate burden on shippers in the classification process. If anything, the many measures that the NCC have been required to facilitate shipper participation has increased the burdens the carriers have in conducting their classification activities.

One such recent "reform," namely arbitration, raises serious questions regarding the validity of NASSTRAC/NITL concerns about shipper participation in the classification. NASSTRAC & NITL insisted that the availability of arbitration was essential to eliminating the "perception of bias" that they contended exists in the classification process. At considerable expense and effort, the NMFTA located an arbitration body, with transportation expertise, which was willing to undertake classification matters. The arbitration process was implemented in February, 2004. More than a year later not a single shipper has engaged an NCC or Classification Panel classification action in the arbitration process. During that period the NCC and

Classification Panels handled some 85 classification proposals. How credible are the NASSTRAC/NITL complaints about the classification when they convince the Board that a final determination on a motor carrier classification proposal should not be in the hands of the NCC carriers but should, instead, be subject to arbitration if a shipper so desires, and then those same groups acknowledge that no use has been made of that process? Ironically, NASSTRAC/NITL then goes on to criticize the very "remedy" they insisted was absolutely necessary to create greater shipper confidence and participation in the classification process. (See Joint Comments, p. 9), where it is argued that shippers should not have "the burdens of engaging lawyers and consultants, gathering facts, and going before an arbitrator, the Board, and/or a court for relief." (Emphasis added)

Further, efforts of the "advisory group" to address "the possibility of a linear scale of density guidelines" would be futile. NASSTRAC/NITL obviously does not understand that the sought linear relationship in the classes associated with the established density breaks is and would be invalid. The current classes and densities are reasonably related and have been so recognized by the ICC and STB in numerous proceedings wherein density was the controlling transportation characteristic. They do not penalize shippers as the classes reflect the loadings that can be effectuated in the carriers' vehicles with commodities having the identified density characteristics. Because lighter density freight achieves considerably lighter loading weights, higher class ratings are assigned within those breaks to ensure that such freight bears its fair share of the transportation burden as compared to those classes assigned to higher density, heavier loading freight. As indicated, the classes applied with all those weight breaks have long been approved by the ICC and the Board. There is nothing "unfair"

about those guidelines, and, except for NASSTRAC/NITL's theoretical and invalid approach to density/class assignments, no reason exists to depart from those long-standing and proven standards.

B. Opposition To Antitrust Immunity For Collective Classification-Making Activities Is Not Relevant To This Proceeding

The objections of NASSTRAC/NITL, and certain lamps and lighting fixture manufacturers to the continuation of antitrust immunity for collective classification activities are misplaced. (See, e.g., Joint Comments, p. 9) This proceeding arises under Section 13703(c)(1) and (2) of 49 U.S.C., and involves the review of the NCC's Section 5a Agreement for the purpose of determining whether changes of the conditions of approval or termination is "necessary to protect the public interest." Antitrust immunity is conferred upon the collective activities conducted under and pursuant to a Board-approved or renewed agreement by virtue of Section 13703(a)(6) of 49 U.S.C. Public interest is determined by the consistency of the collective classification-making activities with the furtherance of the goals of the National Transportation Policy. (See Section 13101(a) of 49 U.S.C.) The fact that antitrust immunity, conferred by law upon approved or renewed Section 5a Agreements, is objected to by certain shipper interests has no bearing on the determination of whether such collective activities serve the public interest.

The public interest value of the motor carrier freight classification cannot be disputed. Both in the many legislative changes enacted by Congress since 1980, and the extended reviews of the NCC's Section 5a Agreement undertaken by the ICC and the Board during almost 25 years, collective freight classification by motor carriers has been deemed to serve the public interest. (See NMFTA and NCC March 2, 2005 Opening

Comments, pp. 2-10) In every one of those legislative and agency reviews opposition to the continuation of antitrust immunity was raised and rejected as not material. Properly, no weight should be accorded to that repeated and meritless objection here.

C. No Problems Have Been Demonstrated With The Recently Revised Classification Procedures Requiring Specific Modifications By the Board

The Board's Decision served on December 10, 2003 in Section 5a Application No. 61 (Sub-No. 6), National Classification Committee—Agreement, concluded a proceeding essentially initiated with comments filed on January 29, 1998 seeking renewal of the NCC's collective classification-making agreement, and summarily approved the incorporation into the NCC's Section 5a Agreement of all the changes in the procedures identified by the Board. This proceeding nonetheless is the product of Section 13703(c)(2) of 49 U.S.C., incorporated into the Act through the Motor Carrier Safety Improvement Act of 1999, which requires a periodic review of all Section 5a Agreements during every five-year period commencing with the date of enactment of that provision. The purpose of such review, as prescribed in Section 13703(c)(1) of 49 U.S.C., is to determine whether Board action, necessary to protect the public interest, is required.

Essentially, there are two categories of comments submitted in opposition to the NCC's Agreement. NEMA and individual lamps and lighting fixture manufacturers who recently were unsuccessful in opposing the establishment of a revised density-based provision on their products seek the termination of the NCC's agreement. Importantly, they do not and cannot point to any failure of the NCC to follow the recently approved procedures or deny that they were given every opportunity to present their information. Moreover, they did not challenge the reasonableness of the NCC's classification action before a neutral arbitrator or the Board. In sum, they oppose antitrust immunity for the

NCC and request the termination of the NCC's Agreement without a single fact demonstrating why that action would be necessary to protect the public interest. Their vindictive attack on the NCC for the reclassification of their products does not constitute reasonable grounds for the Board to take the action they request.

The second category of comments is the joint response of NASSTRAC/NITL. Other than an unwarranted attack on the professionalism of the NMFTA staff of classification experts, and flagrantly erroneous statements about a purported plot of the NCC member motor carriers to use the classification to raise rates, that statement merely revisits matters previously presented, considered and rejected by the Board. In light of the NASSTRAC/NITL complaint about the burdens of the use of arbitration, approved by the Board because of the "perception of bias" in the classification process that those same organizations argued existed, renewal of past contentions without any substantiation should be given no weight here. On balance none of the commentators opposing the NCC Agreement have presented any valid concerns requiring further redress by the Board at this time.

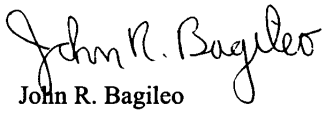
SECTION IV

CONCLUSION

IV.
Conclusion

For all the foregoing reasons, it is submitted that the comments of NASSTRAC/NITL, NEMA and the lamps and lighting fixtures shippers fail to identify any matters which necessitate Board modification of the NCC's existing Section 5a Agreement in order to protect the public interest. Therefore, it is requested that the Board renew the NCC's extant Agreement in Section 5a Application No. 61.

Respectfully submitted,



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Traffic Association, Inc. and the
National Classification Committee

Due and Dated: April 1, 2005